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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL DiPIRRO, **Plaintiff and Appellant,** **v.** **AMERICAN ISUZU MOTORS INC., et al.,** **Defendants and Respondents.**	**A102961** **(Alameda County Super. Ct. No. 02-048648)**

If a private plaintiff in a Proposition 65[1] lawsuit fails to provide a required certificate of merit 60 days before filing the complaint, may that failure be cured by providing the certificate after litigation has begun? In the published portion of this opinion, we conclude that providing the certificate postlitigation is not a cure because it impairs one method of achieving the statutory goal of reducing frivolous lawsuits.

Appellant Michael DiPirro appeals from an order of dismissal in favor of respondents American Isuzu Motors Inc., Hyundai Motor America, Kia Motors America, Inc., Mazda North American Operations, and Mitsubishi Motor Sales of America, Inc., pursuant to those respondents' successful motion for judgment on the pleadings.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, part II of this opinion is not certified for publication.

1 The Safe Drinking Water and Toxic Enforcement Act of 1986. (Health & Saf. Code, § 25249.5 et seq.)

All undesignated section referenced are to the Health & Safety Code.

Appellant contends the trial court erred in ruling that his failure to comply with the prelitigation certificate of merit requirement under section 25249.7, subdivision (d) mandated dismissal of his Proposition 65-based causes of action. We affirm.

BACKGROUND

Proposition 65 prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from discharging or releasing such a chemical into any source of drinking water, except as specified. (§ 25249.5 et seq.)

Proposition 65 actions may be filed by public prosecutors or by private persons in the public interest (hereafter, private enforcers). Since its adoption, Proposition 65 has required a private enforcer to provide a 60-day notice of the violation that is the subject of the action prior to commencing the action. This notice must be served on public prosecutors and the violator. (§ 25249.7, subd. (d).) In 2001, the Legislature amended this notice provision to require that, in cases claiming a failure to warn, the notice include a "certificate of merit" stating that the private enforcer or his or her attorney consulted with one or more experts who "reviewed facts, studies, or other data" regarding the chemical exposure at issue, and believe "there is a reasonable and meritorious case for the private action." (Stats. 2001, ch. 578, § 1; see Sen. Rules Com., Off. of Sen. Floor Analysis, 3d reading analyses of Sen. Bill No. 471 (2001-2002 Reg. Sess.) as amended Sept. 13, 2001, coms., pp. 2-3.) The amendment (hereafter, Senate Bill No. 471) also requires that factual information sufficient to establish the basis of the certificate of merit be attached to the copy of the certificate served on the Attorney General.[2] Senate Bill

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[2] As amended by Senate Bill No. 471, section 25249.7, subdivision (d) provides:

"(d) Actions pursuant to this section may be brought by any person in the public interest if both of the following requirements are met:

"(1) The private action is commenced more than 60 days from the date *that* the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the

No. 471 was prompted by a concern that private enforcers were abusing Proposition 65 by filing meritless lawsuits alleging that businesses had failed to provide adequate warnings about chemical discharges. Senate Bill No. 471 was designed to discourage such lawsuits. (See Sen. Rules Com., *supra*, coms. p. 2.) The legislation was approved by the Governor in October 2001, and became effective January 1, 2002. (Stats. 2001, ch. 578, § 1.)

In December 2001, *between* the Governor's approval of Senate Bill No. 471 and the amendment's effective date, appellant filed 60-day notices with five automobile companies that sell touch-up paint.[3] No certificates of merit were included. These notices recited that this product exposed people to toluene without proper warnings concerning the toxic effects of such exposure. These December 2001 notices were also served on the appropriate public enforcement agencies. On April 24, 2002, *almost* four

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alleged violator. *If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney. The certificate of merit shall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.*

"(2) Neither the Attorney General, any district attorney, any city attorney, *nor any* prosecutor has commenced and is diligently prosecuting an action against the violation." (Stats. 2001, ch. 578, § 1, italics added to reflect the provisions added by Sen. Bill No. 471.)

3 On the court's own motion (Evid. Code, §§ 452, subd. (h), 459; see also *Adoption of Michele T.* (1975) 44 Cal.App.3d 699, 706), we take judicial notice of the following information: During the relatively brief period between the Governor's approval (Oct. 5, 2001) of Senate Bill No. 471 and its effective date (Jan. 1, 2002), *3,696* 60-day notices were filed by private enforcers. This is approximately the same number (*3,964*) of such notices filed by private enforcers in the more than 13 years preceding the Governor's approval of Senate Bill No. 471. (Cal. Off. of Atty. Gen., Programs & Services, 60-Day Notice Search, at <http://prop65.doj.ca.gov/publicsearch.taf>.)

months *after* the effective date of the certificate of merit requirement, appellant filed the current Proposition 65 enforcement action. On May 17, 2002, appellant filed a first amended complaint, alleging causes of action for violation of Proposition 65 itself (Health & Saf. Code, § 25249.6 et seq.) (first cause of action), for Proposition 65-based unlawful business practices under Business and Professions Code section 17200 (second cause of action), and for false advertising under Business and Professions Code section 17500 (third cause of action). On August 2, 2002, appellant served respondents with new 60-day notices that included a certificate of merit, thereby attempting to cure any defect in the earlier notices.

On September 4, 2002, respondents served on appellant a motion for judgment on the pleadings, and on October 24, 2002, the trial court issued its initial order granting the motion as to the cause of action for violation of Proposition 65 itself, and the cause of action for unlawful business practices. The court held that the certificate of merit requirement applied to this case because the complaint was filed after Senate Bill No. 471's effective date. It rejected appellant's contention that his 60-day notices, served in December 2001, were valid when issued and could not be retroactively nullified by the subsequent procedural change to section 25249.7, subdivision (d). In the unpublished portion of this opinion, we affirm this ruling. In the published portion of this opinion, we affirm the trial court's conclusion that a private enforcer may not cure the failure to timely provide a certificate of merit by serving it months after the litigation commenced.[4]

DISCUSSION

I. *Standard of Review*

We begin with the applicable standard of review. "Because a motion for judgment on the pleadings is similar to a general demurrer, the standard of review is the same. [Citation.] We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Baughman v. State of California*

[4] Subsequent pleading skirmishes eliminated the remaining claims against respondents on grounds unrelated to the dispute over the certificates of merit.

(1995) 38 Cal.App.4th 182, 187.) "Matters which may be judicially noticed may also be considered. [Citation.]" (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1104.) "We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory. [Citation.]" (*Begier v. Strom* (1996) 46 Cal.App.4th 877, 881.)

Where, as here, leave to amend was not granted, we determine whether the defect can reasonably be cured by amendment. The judgment is to be affirmed if it is proper on any lawful grounds raised in the motion, even if the trial court did not rely on those grounds. We review the court's denial of leave to amend for abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II. *Certificate of Merit Requirement Was Not Applied Retrospectively*[*]

Both parties agree that Senate Bill No. 471 is procedural, not substantive, in nature. "A statute is procedural when it neither creates a new cause of action nor deprives a [litigant] of any defense on the merits. [Citation.]" (*Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49.) Here, Senate Bill No. 471 is procedural since it affects only the steps a private enforcer must take in order to commence an action under Proposition 65—the enactment has not affected the substantive right to sue for alleged Proposition 65 violations.

In the absence of an express declaration of retrospectivity, a new statute is presumed to be prospective only. In analyzing whether a new statute is being improperly applied retrospectively, the courts have distinguished between substantive and procedural laws. Where a statute, like Senate Bill No. 471, is procedural, applying the changed procedure "to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future." (*Brenton v. Metabolite International, Inc.* (2004) 116 Cal.App. 4th 679, 689.) "Such a statute ' "is not made retroactive merely because it draws upon

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[*] See footnote, page 1.

facts existing prior to its enactment . . . . [Instead, the] effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." [Citations.]' For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' [Citation.]" (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) The courts have reasoned that "[n]o litigant has any vested rights in mere matters of procedure [citations] so long as an adequate remedy remains [citations]." (*Casey v. Katz* (1952) 114 Cal.App.2d 391, 393.)

We apply the foregoing principles to the present case. The new procedural requirements of Senate Bill No. 471 became effective January 1, 2002. Appellant did not file the original complaint in this action until nearly four months later. Thus, appellant had ample time to serve the notice, including the required certificate of merit, without delaying or hindering the prosecution of his Proposition 65 claims. Because the requirements imposed by Senate Bill No. 471 did not diminish any rights provided to appellant by Proposition 65, they may be applied to this case.

Buck v. Canty (1912) 162 Cal. 226 is instructive. In *Buck*, a delinquent taxpayer (Buck) lost his property to the state, which then decided to sell it to a third party (Canty). The state published the requisite notices for three consecutive weeks and then sold the property. However, the statute authorizing the sale was amended to add an additional requirement that the state notify the delinquent taxpayer directly. This amendment became effective after publication had begun, but before the sale. No such notice had been provided to Buck. (*Buck*, at pp. 229-230.) On appeal, Canty raised an argument similar to the one advanced by appellant here: the amendment should not be applied retrospectively to change the required notice after that notice had been given. Canty argued that once the state gave the notice then required by law, it had a vested right to sell the property that could not be impaired. The Supreme Court disagreed, concluding that "there was no vested or fixed right in the state to sell property," and that, in any event, "the amendment does not at all impair the right of the state to sell . . . . [T]he legislature has simply provided for additional notice to be given before a sale may be made." (*Buck*, at p. 233.) Since the legislation did not disturb vested rights, it did not

violate the constitutional provision against retroactive laws. (*Buck*, at p. at 234; *Strauch v. Superior Court, supra* 107 Cal.App.3d at p. 49 ["An amendment of a procedural statute applies to cases pending at the time of its enactment, providing vested rights are not affected."].)

In his reply, appellant, for the first time, appears to articulate the theory that serving the 2001 notices provided him with a vested right that may not be divested by Senate Bill No. 471. He argues: The 60-day notice "provides prophylactic protection to the noticing party by preventing other private citizens from gaining priority to commence such actions if the public entities do not act in a diligent manner. Simply put, the service of a [60]-day notice drafted in conformity with [California Code of Regulations, title 22, section 12903] entitles the citizen to certain contingent rights." This argument is triply waived. It was not raised in the trial court or in appellant's opening brief (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2), and appellant has failed to cite pertinent authority and provide reasoned argument in support of his contention (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948).[5]

Finally, appellant attempts to rely upon a letter opinion from the Attorney General dated December 21, 2001, to support his assertion that the new certificate of merit requirement, added by Senate Bill No. 471, should not void the 60-day notices he sent prior to the date that the amendment changes became effective. Appellant's reliance on the opinion letter is misplaced. Although opinions of the Attorney General are entitled to great weight, they are not binding (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) Because we find the views expressed in the opinion letter unpersuasive, we decline to follow them.

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5 The statute of limitations for this action is one year (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 976-978), though many claims for the failure to warn relate to continuing violations. Here, appellant never contended that the limitations period would have adversely affected his ability to provide proper notice, accompanied by a certificate of merit, and to refile his lawsuit after the order of dismissal.

The Attorney General's opinion letter relies principally on *Florence Western Medical Clinic v. Bontá* (2000) 77 Cal.App.4th 493, 503, and sets forth the standard test for retroactivity as follows: "A prospective statute, however, still applies to parts of a proceeding already pending on the effective date of the statute. A statute is considered to have been applied retroactively 'only if it changes the legal consequences of an act *completed* before the effective date of the statute. A statute addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date of the statute.' [Citation.]" We part company with the Attorney General on the application of that test in the particular factual context of this case. The Attorney General concluded that "new requirements of [Senate Bill No. 471] apply whenever the fact or procedural step triggering the new duty occurs on or after January 1, 2002. [¶] . . . The act triggering the duty to provide a certificate of merit is the giving of a notice of violation. Thus, a notice given prior to January 1, 2002, is not required to include the certificate of merit." Respectfully, we conclude it is more appropriate to hold that the *filing of the complaint* triggers a duty to provide notice and, in an appropriate case, to provide a certificate of merit. That is, private enforcers may not file complaints under Proposition 65 without complying with these requirements. Since appellant failed to establish that imposing the requirements of Senate Bill No. 471 to his complaint impaired any of his vested rights, we affirm the trial court's decision.

Months before the complaint in this action was filed, Senate Bill No. 471 imposed a new, procedural requirement: the filing could not occur until a 60-day notice, accompanied by a certificate of merit was served on the appropriate parties. Applying this requirement to appellant does not constitute a retrospective application of the amendment.

III. *"Curing" Failure to Serve Certificate Of Merit*

In August 2002, several months after the complaint in this action was filed, appellant served certificates of merit on the proper parties. Appellant contends that the trial court abused its discretion in refusing him leave to amend his complaint to allege compliance with the certificate of merit requirement based on this August 2002 service.

He argues that the late service legally cured any deficiencies in the December 2001 60-day notices. We disagree.

Section 25249.7, subdivision (d), as amended, provides: "Actions pursuant to this section may be brought by any person in the public interest if . . . : [¶] (1) *The private action is commenced more than 60 days from the date that the person has given notice* of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action . . . . If the notice alleges a violation of section 25249.6, the notice of the alleged violation shall include a certificate of merit . . . ." (Italics added.) In interpreting this provision, we are on familiar ground. "We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.]" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Here, the language of the section is unambiguous—the notice and certificate of merit must be provided *before* the action is commenced.

Appellant argues that *Strauch v. Superior Court, supra* 107 Cal.App.3d 45 and *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355 compel a different result. Code of Civil Procedure section 411.35 requires plaintiffs in certain professional negligence cases to serve and file a certificate of merit on the defendant prior to the date of service of the complaint. *Strauch* involved a predecessor statute, former Code of Civil Procedure section 411.30[6] (hereafter, former section 411.30), which required that a certificate of merit be filed with any medical malpractice complaint. In *Strauch*, despite the plaintiff's failure to file the required certificate, the trial court granted him relief from late filing and permitted him to file the certificate. The Court of Appeal affirmed, relying, in part, on an amendment to former section 411.30 that permitted the certificate of merit to be filed on or before the date of *service* of the complaint and made the complaint subject to demurrer for failure to comply. (*Strauch*, at p. 48.) Since the failure to file the certificate was

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6 Former Code of Civil Procedure section 411.30 was repealed effective January 1, 1989. (Stats. 1986, ch. 247, § 1, p. 1207.)

"demurrable only and curable" (*id.* at p. 49), the trial court properly allowed plaintiff to file the certificate after suit was filed. *Strauch* noted that this result was consistent with the statutory policy behind former section 411.30. "The manifest policy of [former] section 411.30 is to require that a plaintiff provide some independent support of the merits of the action before the action is pursued. [The plaintiff] has satisfied that policy." (*Strauch*, at p. 49.)

In *Price v. Dames & Moore, supra,* 92 Cal.App.4th 355, plaintiff filed a professional negligence complaint against a licensed engineer, triggering the certificate of merit requirement in Code of Civil Procedure section 411.35. Because the plaintiff failed to file the certificate before serving the complaint on the engineer, the trial court sustained defendants' demurrers without leave to amend. The Court of Appeal reversed, concluding that the trial court should have granted plaintiff leave to file an amended complaint and a proper certificate. So long as the certificate was filed before the amended complaint was served, the certificate would be timely. (*Price*, at pp. 360-361.) "Permitting leave to amend will not frustrate the statutory purpose of preventing frivolous professional negligence claims. Indeed, it will serve that purpose by ensuring the filing of a proper certificate of merit and the availability of substantial sanctions to respondents if they prevail in the action and thereafter succeed in showing that [the plaintiff] actually failed to comply with the requirements for a certificate of merit. [Citations.]" (*Id*. at p. 361.) Neither *Strauch v. Superior Court* nor *Price v. Dames & Moore* is apposite here.

Unlike the claims in professional negligence cases, Proposition 65 claims are not solely private. Though private enforcement of Proposition 65 claims is permitted, public suits are preferred. (*Yeroushalmi v. Miramar Sheraton* (2001) 88 Cal.App.4th 738, 750.) A private enforcer must notify the public prosecutor before filing suit and may not file if that prosecutor files its own claim for the same violation before the 60-day postnotice period elapses. (§ 25249.7, subd. (d)(2).)

Senate Bill No. 471 not only imposed a certificate of merit requirement similar to the one imposed by Code of Civil Procedure section 411.35, it also required the private enforcer to provide to the Attorney General "[f]actual information sufficient to establish

the basis of the certificate of merit." (Health & Saf. Code, § 25249.7, subd. (d)(1).) Each of these two new requirements is designed to discourage frivolous suits in different ways. First, if the action is subsequently filed and proceeds to judgment, the court may review the certificate of merit, and if it has no credible basis in fact, find the action frivolous and impose sanctions under the Code of Civil Procedure. (Health & Saf. Code, § 25249.7, subd. (h)(2).) In this respect, Senate Bill No. 471 is similar to Code of Civil Procedure section 411.35. In Proposition 65, however, the deterrent effect of this potential sanction is enhanced by the second requirement added by Senate Bill No. 471: providing factual data to the Attorney General *before* litigation has commenced facilitates the extrajudicial resolution of disputes. The regulations enacted following adoption of Senate Bill No. 471 set out in detail what factual material must be provided (Cal. Code Regs., tit. 11, § 3102) and authorize contacts between the Attorney General and the noticing party (Cal. Code Regs., tit. 11, § 3103, subd. (b)). Thus, the amendment envisioned that efforts to discourage the lawsuit could be undertaken by the state's chief law enforcement officer following receipt of the 60-day notice, the certificate of merit and the underlying factual data.[7] By requiring the private enforcer to supply the Attorney General with the factual information supporting the merits of its claim, Senate Bill No. 471 increases the Attorney General's understanding of the claim's likelihood of success, allowing that office to focus its efforts to discourage filing of the truly frivolous. In addition, armed with this additional information, the Attorney General should be better able to persuade a private enforcer to either refrain from filing a frivolous suit, or, in conjunction with the alleged violator, to resolve the matter before a suit is filed, defense lawyers are hired and a litigation posture is developed. Permitting a private enforcer to serve this certificate and data *after* the lawsuit has been filed is, therefore, an incomplete "cure." Although the late service would not interfere with the imposition of sanctions following completion of the

[7] At oral argument, appellant informed the court that, even before Senate Bill No. 471 was enacted, representatives of the Attorney General's Office would confer with private enforcers following receipt of the 60-day notice, and, if appropriate, seek to discourage the filing of Proposition 65 suits that were believed to be meritless.

lawsuit, it would reduce the effectiveness of prelitigation efforts by the Attorney General to discourage filing the frivolous suit in the first place.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs in defending this appeal.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.

Superior Court of the County of Alameda, No. 02-048648, Bonnie Lewman Sabraw, Judge.

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